Petition

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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1980

MAMOON RASHID KAHLON,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Questions Presented For Review

I. Whether the judgment of the Appellate Division, reversing the trial court's suppression of evidence obtained from a warrantless search of closed containers in the trunk of your Petitioner's automobile should be reversed in light of *Robbins* v. *California,* ..... U.S. ....., (No. 80-148, July 1, 1981) and *Bible et al.* v. *Louisiana,* ..... U.S. ..... (No. 80-1080, July 2, 1981)?

II. Whether the Appellate Division's reliance upon independent fact-findings controverted by the record, and its arbitrary refusal to allow your Petitioner to supplement the record in order to demonstrate the erroneous nature of said independent fact-findings denied your Petitioner the fair appellate review to which he is entitled, in violation of his Fourteenth Amendment right to due process of law?

List of Parties to the Proceeding

Mamoon Rashid Kahlon—Petitioner
State of New Jersey—Prosecuting Authority and Respondent
Honorable James R. Zazzali—Attorney General of New Jersey
David Linett—Somerset County Prosecutor

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Official Report of the Case

The interlocutory opinion of the Superior Court of New Jersey, Appellate Division is reported as *State* v. *Kahlon*, 172 N.J. Super. 331 (App. Div. 1980). A copy of this decision, as well as Orders denying your Petitioner's Motion for Leave to Appeal the interlocutory decision to the Supreme Court of New Jersey, granting the State's Motion for Summary Affirmance of the final judgment, and denying your Petitioner's Petition for Certification are included in the Appendix of this Petition.

Grounds upon Which the Jurisdiction of the Supreme Court is Invoked

The Superior Court of New Jersey, Appellate Division, denied your Petitioner's Petition for Rehearing on February 17, 1981. The Supreme Court of New Jersey declined discretionary review and denied your Petitioner's Petition for Certification by an Order filed June 5, 1981. The jurisdiction of this Honorable Court is hereby invoked pursuant to Title 28, United States Code §§ 1257(3) and 2201 and Rule 20 of the Rules of the Supreme Court of the United States.

Constitutional Provisions and Rules Involved

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article VI, Section II (3) of the Constitution of New Jersey, 1947, provides:

> 3. The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

Article VI, Section V (1) and (2) of the Constitution of New Jersey, 1947, provides:

1. Appeals may be taken to the Supreme Court:

(a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;

(b) In causes where there is a dissent in the Appellate Division of the Superior Court;

(c) In capital causes;

(d) On certification by the Supreme Court to the Superior Court and, where provided by rules of the Supreme Court, to the inferior courts; and

(e) In such causes as may be provided by law.

2. Appeals may be taken to the Appellate Division of the Superior Court from the Law and Chancery Divisions of the Superior Court, and in such other causes as may be provided by law.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Now Comes the Petitioner, Mamoon Rashid Kahlon, by and through his counsel, and respectfully prays this Honorable Court to issue a Writ of Certiorari, to the Superior Court of New Jersey, Appellate Division, to review the judgment entered therein.

Statement of the Case

Procedural History

The Petitioner, Mamoon Kahlon, was arrested by Trooper Richard Toth on October 3, 1978, and, as a result, was charged in Complaint No. SD 96746 with unlawful use of marijuana, contrary to N.J.S. 24:21-20(b), and with entering the State for an unlawful purpose,

contrary to N.J.S. 2A:170-1. In addition, the Petitioner was charged with possession of marijuana in excess of twenty-five grams and possession of same with intent to distribute, contrary to N.J.S 24:20(a)(4) and 24:21-19 (a)(i).

On November 9, 1978, a probable cause hearing was held before the Honorable George B. Esposito in the Bridgewater Municipal Court, Somerset County, New Jersey. The State prevailed and the matter was forwarded to the County Prosecutor. Thereafter, the Petitioner was indicted for the latter two charges by a Somerset County Grand Jury in Indictment No. 168-78-J.

A Motion to Suppress Evidence was filed and heard by the Honorable Arthur S. Meredith, J.S.C., on June 15, 1979 and June 18, 1979. Judge Meredith ordered that all evidence seized from the warrantless searches of the Petitioner's person, vehicle trunk and the containers stored therein be suppressed as violative of the Defendant's Fourth Amendment rights. The State moved for leave to appeal on July 23, 1979, and said motion was granted on August 24, 1979. Oral argument was heard by the Appellate Division on January 31, 1980, and on February 13, 1980, the decision of the trial court was reversed. A Motion for Leave to Appeal to the Supreme Court of New Jersey was then filed by the Petitioner and denied by Order filed April 30, 1980.

The Petitioner then entered a plea of guilty to the second count of the indictment preserving the right to appeal the constitutionality of the search of his vehicle and the closed containers seized from said vehicle's locked trunk. Orders were entered dismissing Count One of Indictment No. 168-78-J and Count One and Two of Complaint No. SD 96746.

On June 20, 1980, the Petitioner, Mamoon Kahlon, was sentenced to serve not less than one nor more than two years incarceration in the State Prison, Trenton, New Jersey and the Judgment of Conviction was entered by the Court on that day. A timely Notice of Appeal was filed on June 26, 1980.

On September 29, 1980, the Petitioner filed his Brief on Appeal and a companion Motion to Supplement the Record with the transcript of proceedings at the probable cause hearing. On October 21, 1980, the State filed an untimely Motion for Summary Affirmance. On November 13, 1980 the Petitioner responded to the merits of the State's motion and requested full briefing on the merits of the contested searches. On October 23, 1980, two days after the filing of the State's Motion for Summary Affirmance, the Appellate Division dismissed the Petitioner's Motion to Supplement the Record on the basis of a technical failure to comply with R. 2:8-1(a). The State had not objected to said noncompliance.

On November 17, 1980, The Appellate Division, *sua sponte,* allowed the filing of the State's untimely Motion for Summary Affirmance *nunc pro tunc,* and proceeded to grant said motion. In so doing, the Appellate Division reasoned that since it had dismissed the Petitioner's Motion to Supplement the Record, the disposition of the appeal was governed by the "law of the case" doctrine.

The Petitioner's New Jersey Counsel, Thomas E. Lenahan, did not receive notice of either the Appellate Division's Order dismissing the Petitioner's Motion to Supplement the Record or its Order granting the State's Motion for Summary Affirmance until December 3, 1980. Since by that time it was impossible to file a timely Petition for Rehearing pursuant to R. 2:11-6, the Peti-

tioner was constrained to file a Notice of Petition for Certification in the Supreme Court of New Jersey on or about December 14, 1980. Immediately thereafter the Petitioner filed a Petition for Rehearing, an Amended Motion to Supplement the Record, and a Motion for Leave to File Petition for Rehearing Out of Time and *Nunc Pro Tunc* in the Appellate Division. It was expressly noted that the Attorney General's office had no objection to the latter two motions. On December 24, 1980, the Petitioner, Mamoon Kahlon, filed a Motion in the Supreme Court of New Jersey requesting both that the cause be temporarily remanded to the Appellate Division for consideration of the above three motions and an extension of time for filing your Petitioner's Petition for Certification until ten days after the Appellate Division's disposition of said Motions. The Motion for Leave to File Petition for Rehearing Out of Time and *Nunc Pro Tunc* was granted by the Appellate Division. On January 27, 1981, the Supreme Court of New Jersey temporarily remanded the instant case to the Appellate Division pursuant to the aforementioned motion of December 24, 1980.

On February 17, 1981, an order denying the Petitioner's Amended Motion to Supplement the Record and his Petition for Rehearing was signed by the Honorable John W. Fritz. No explanation or opinion accompanied these Orders.

A timely Petition for Certification was filed in the Supreme Court of New Jersey which was denied by an Order filed June 5, 1981. Your Petitioner is presently free on $10,000 cash bond conditionally continued by the Supreme Court of New Jersey and granted pending certiorari by Associate Justice William J. Brennan.

STATEMENT OF FACTS

New Jersey State Trooper Richard Toth testified at the motion to suppress that on October 3, 1978, at approximately 4:20 P.M., he was clocking eastbound traffic on Route 78 from a stationary position at mile post 28. The weather was clear and the flow of traffic was described by Trooper Toth as "medium". Trooper Toth's police vehicle was ten yards off the highway hidden behind a bush. Toth was equipped with a K-55 radar unit set to operate at 1,600 yards. Trooper Toth testified that he saw the radar device register a vehicle traveling at 30 miles per hour and looked up in time to note a 1972 tan Buick pass him by. There were cars in front of the tan Buick as well as cars coming up behind. Toth testified that between 35 seconds and one minute elapsed before he pulled out to pursue the Buick and that he ultimately pulled the Buick over at mile post 20 where Route 78 branches into Route 287. Although the Buick was in the center lane when it passed Toth's stationary position, it was in the right lane "when I finally put the dome lights on." Trooper Toth testified that there was no problem with the stop.

When the Buick stopped, Trooper Toth brought his vehicle to a rest about two car lengths behind it. Although Toth testified at the motion to suppress that the Petitioner, Mr. Kahlon, remained in his vehicle while Toth approached the driver's window, he testified at the probable cause hearing that Mr. Kahlon immediately exited his vehicle and met him at the rear of the Buick. Either way, when Toth asked for a driver's license and registration, they were produced for the Trooper's inspection. Trooper Toth described Mr. Kahlon as cooperative. Trooper Toth could not see the Buick's ashtray from his po-

sition. Toth testified that he had seen no one smoking before pulling the vehicle over and that he could see no smoke inside the car. Aside from the Petitioner, there was a man in the front passenger seat and a woman in the rear seat of the vehicle.

Trooper Toth then asked Mr. Kahlon to exit the Buick and join him at the rear of the vehicle. Toth said "you reek of marijuana." According to Toth, Mr. Kahlon replied that the occupants of his vehicle were hitchhikers he had picked up in Harrisburg and it was they who had been smoking marijuana. Toth then removed the two people from the Buick and began questioning them, but was only able to ascertain that they were French students heading for New York who spoke very little English. Contrary to his observation of Mr. Kahlon there was no indication that Toth noticed any odor of marijuana emanating from the passengers. According to Trooper Toth, it was at this point that Mr. Kahlon admitted that it was he and not the French students who had at some point been smoking marijuana. Toth testified he then advised Mr. Kahlon of his constitutional rights.

Trooper Toth then patted down all three persons and moved them to the side of the road by the guardrail. Toth then proceeded to search the front seat of the Buick to determine where the odor of "burning marijuana" he had noticed earlier was coming from. Trooper Toth testified that he first looked in the ashtray and there he found a half-burned marijuana cigarette. Toth then pulled down the driver's side visor and a clear plastic bag of marijuana fell down along with a pack of cigarette wrapping papers.

Trooper Toth then advised Mr. Kahlon and his riders that they were under arrest. Mr. Kahlon spoke up and said "please, don't arrest the French students because they had no knowledge of the marijuana." Mr. Kahlon was then handcuffed at the rear of the Buick. At this time, another New Jersey State Trooper arrived and took the two French students to the police barracks. Trooper Toth informed Mr. Kahlon that his vehicle was being impounded and that they would wait at the scene until the tow truck arrived, Trooper Toth then placed Mr. Kahlon in his police vehicle.

Although the record is silent, it is safe to assume that Trooper Toth followed the customary police practice of securing an arrestee with the seat belt and shoulder harness of the police vehicle as well as the handcuffs. Trooper Toth testified that at the time of the arrests of the French students, they had previously been patted down, that they wore only T-shirts and jeans that were incapable of concealing anything, and that he "felt comfortable." Mr. Kahlon's attitude was cooperative.

Although there was nothing in the back seat of the Buick except a portable T.V. set on the floor, Trooper Toth entered the back seat. Toth only then "detected what he believed to be a rather heavy odor of unburned marijuana." Toth lifted out the back seat of the Buick but found nothing. Trooper Toth took the keys from the ignition and opened the trunk. Inside the trunk, Trooper Toth observed one or two suitcases, a plastic clothing bag, and a cardboard box that "appeared to be a thirty dozen egg crate." Toth testified that the "flaps were such that the box was closed." The cardboard flaps did not cover the top of the box completely but left a six by six

square on the top covered by green plastic. In the square, Trooper Toth could see only green plastic. Toth smelled the box and decided that it was the source of the odor. He then seized the box, opened the flaps, tore open a hole in the green plastic, and observed what he believed to be marijuana. Toth then placed the box in the back seat of his police vehicle.

Reasons For Allowing the Writ

I. The Judgment of the Appellate Division, reversing the trial court's suppression of evidence obtained from a warrantless search of closed containers in the trunk of your Petitioner's automobile, should be summarily reversed in light of Robbins v. California, ... U.S. ..... (No. 80-148, July 1, 1981) and Bible et al. v. Louisiana, ... U.S. ..... (No. 80-1080, July 2, 1981).

Your Petitioner, Mamoon Rashid Kahlon, respectfully submits that under the circumstances exhibited by the record in the case at bar, the Appellate Division's refusal to apply the principles enunciated in the cases of *United States* v. *Chadwick*, 433 U.S. 1 (1977) and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979) resulted in a denial of rights guaranteed to him under the warrant clause of the Fourth Amendment, made binding upon the states in *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The Petitioner contends that this Court's recent decisions in *Robbins* v. *California*, ... U.S. ..... (No. 80-148, July 1, 1981), where this Court applied the *Sanders* holding to a search occurring on January 5, 1975; and in *Bible et al.* v. *Louisiana*, ... U.S. ....., (No. 80-1080, July 2, 1981) where this Court vacated by *per curiam* Order a judgment of the Supreme Court of Louisiana refusing to apply *Sanders* retroactively, are dispositive of the case at bar. The arrest of your Petitioner occurred on October 3, 1978. The date of the decision in *Sanders* was June 20, 1979, at which time the state was in the process of prosecuting an interlocutory appeal of the trial court's granting of your Petitioner's Motion to Suppress. The issue then

becomes whether *Sanders* exhibited such a marked departure from the principles recognized in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971) and *United States* v. *Chadwick, supra,* that situations similar to that in *Sanders,* but occurring in the interim between the *Chadwick* and the *Sanders* decisions, should be governed by cases that have been substantially limited, in pertinent part, by *Coolidge* and *Chadwick. Chambers* v. *Maroney,* 399 U.S. 42 (1970) (per se automobile search at station); *Carroll* v. *United States,* 267 U.S. 132 (1925) (per se automobile search on highway). With only two exceptions that your Petitioner's research has been able to reveal, one of which this Court has recently corrected in *Bible et al.* v. *Louisiana, supra,* the states and circuit courts of appeal have answered in the negative and afforded retroactive application of the *Sanders* decision. United States v. *Ross,* ..... F.2d ..... (D.C. Cir., No. 79-1624, en banc, March 31, 1981); *United States* v. *Medina-Verdugo,* 637 F.2d 649 (9th Cir. 1980); *United States* v. *Hartman,* 627 F.2d 7 (6th Cir. 1980); *United States* v. *Bulgier,* 618 F.2d 472, 475 n. 8 (7th Cir. 1980); *United States* v. *Dien,* 609 F.2d 1038 (2d Cir. 1979) adhered to on rehearing 615 F.2d 10 (1980); *United States* v. *Presler,* 610 F.2d 1206 (4th Cir. 1979); *United States* v. *Dall,* 608 F.2d 910 (1st Cir. 1979); *United States* v. *Bella,* 605 F.2d 160 (5th Cir. 1979); *United States* v. *Scheis,* 582 F.2d 1166 (8th Cir. en banc 1978); *People* v. *Plantefaber,* 410 Mich. 594, 302 N.W.2d 557 (1981); *Commonwealth* v. *Benoit,* 415 N.E.2d 818 (Mass. 1981); *Abell* v. *Commonwealth,* 272 S.E.2d 204 (Va. 1980); *State* v. *Jenkins,* 619 P.2d 108 (Haw. 1980); *People* v. *Boyles,* 82 Ill.2d 128, 44 Ill.Dec. 880, 411 N.E. 2d 1346 (1980); *State* v. *Prober,* 297 N.W.2d 1 (Wis. 1980); *State* v. *Filipi,* 297 N.W.2d 275 (Minn. 1980); *Commonwealth* v. *Timko,* 417 A.2d 620 (Pa. 1980); *State* v. *Tomey,* 259 S.E.2d 16 (W.Va. 1979); *People* v. *Dalton,*

24 Cal.3d 850, 157 Cal.Rptr. 497, 598 P.2d 467 (Calif. 1979); *State* v. *Schrier*, 283 N.W.2d 338 (Iowa 1979); *State* v. *Hassapelis*, 404 A.2d 232 (Me. 1979); *State* v. *White*, 94 N.M. 687, 615 P.2d 1004 (1980); *State* v. *Cole*, 265 S.E.2d 507 (N.C. App. 1980); *People* v. *Spencer*, 74 A.D.2d 77, 426 N.Y.S.2d 605 (1980); *Bradford* v. *State*, 401 N.E.2d 77 (Ind. App. 1980); *Pirner* v. *State*, 45 Md. App. 50, 411 A.2d 135 (1980); *State* v. *Delong*, 602 P.2d 665 (Or. App. 1979); *State* v. *Crutchfield*, 123 Ariz. 570, 601 P.2d 333 (1979); *Buday* v. *State*, 150 Ga.App. 686, 258 S.E.2d 318 (1979); *See, State* v. *Dean*, 574, P.2d 572 (Kan. App. 1978), applying *Chadwick* retroactively.

The remaining exception is the State of New Jersey. Thus it seems to your Petitioner that only in the State of New Jersey is it still sometimes held that searches conducted after *Chadwick* but before *Sanders* are not governed by the explication of *Chadwick* set forth in *Sanders*. *State* v. *Dolce*, 178 N.J.Super. 275 (App. Div. 1981); *State* v. *Kahlon*, 172 N.J.Super. 331 (App. Div. 1980). It should be noted that this federal constitutional question is by no means settled in New Jersey. The precise issue has never been addressed by the Supreme Court of New Jersey, however, a number of panels of the Appellate Division have afforded New Jersey defendants relief by explicitly applying the *Chadwick-Sanders* doctrine retroactively.[1] *State* v. *Wain and Wright*, ... N.J.Super. ..... (No. A-4528-78, December 3, 1980); *State* v. *Pace*, 171 N.J.Super. 240 (App. Div. 1979).

As will become evident in the next question presented for review, this issue cannot be avoided with any rectitude

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[1] In his concurring opinion in *State* v. *Patino*, 83 N.J. 1, 414 A.2d 1327 (1980), Justice Pashman unequivocally asserts in a footnote his view that neither *Sanders* nor *Chadwick* announced a new rule of law. *State* v. *Patino*, 83 N.J. at 16 n.1.

on the basis of exigency. At the time of the subject intrusions, Mr. Kahlon was physically restrained in the patrol car and had no access to the contents of the containers in the trunk. The various containers were exclusively within the control of Trooper Toth. The vehicle was immobile awaiting the arrival of the tow truck. Trooper Toth had the keys.

Your Petitioner respectfully suggests that the guidance of this Honorable Court is necessarily to prevent disparate treatment of similarly situated defendants in New Jersey. Moreover, your Petitioner respectfully suggests that the summary relief granted the petitioners in *Bible et al.* v. *Louisiana*, ... U.S. ....., (No. 80-1080, July 2, 1981) would be an appropriate and just disposition of the instant Petition.

II. The Appellate Division's reliance upon independent fact-findings, controverted by the record, and its arbitrary refusal to allow your Petitioner to supplement the record in order to demonstrate the erroneous nature of said independent fact-findings denied your Petitioner the fair appellate review to which he is entitled, in violation of his Fourteenth Amendment right to due process of law.

Your Petitioner, Mamoon Rashid Kahlon, contends that when an appellate court *sua sponte* makes independent findings of fact crucial to its decision, and when said facts are controverted by the record on appeal and by the fair implications of the holding of the trial court, and when there is no appeal as of right from the subject appellate decision, a litigant has been denied his state-granted right to appeal, and, consequently, his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. There is no question that the State of New Jersey provides a right to appeal to its criminal defendants. See New

Jersey Constitutional provisions, *supra; Rova Farms Resort, Inc.* v. *Investors Ins. Co. of Amer.* 65 N.J. 474, 323 A.2d 495 (1974); *State* v. *Johnson,* 42 N.J. 146, 199 A.2d 809 (1964).

The issue then becomes whether your Petitioner has been denied the rights granted to other persons subject to the application of New Jersey law.

As will be noted, the very foundation for the interlocutory appellate decision, summarily affirmed by the Appellate Division, was certain independent appellate findings of fact that are inconsistent with both the finding of the trial court and the record on appeal at the interlocutory stage. On direct appeal from the final judgment, the Petitioner brought these errors to the attention of the Appellate Division and sought to confirm and substantiate them by moving to supplement the record with the transcript of proceedings at the probable cause hearing. This transcript proved beyond peradventure that the factual setting established by the Appellate Division in its disposition of the state's interlocutory appeal was manifestly incorrect, resulting in an improper application of the law of the State of New Jersey and an erroneous resolution of the interlocutory appeal.

The Petitioner's first Motion to Supplement the Record, filed concurrently with the Petitioner's Brief on Appeal, was denied for a technical failure to comply with R. 2:8-1 (a); and the Petitioner's Amended Motion to Supplement the Record was denied without any explanation whatsoever. Having denied these crucial motions, without due consideration of their importance, the Appellate Division summarily disposed of the Petitioner's first direct appeal from a final judgment against him on the basis of the "law of the case" doctrine, because, "the record facts

remain unchanged and are identical here with those of record in the first appeal at least for purposes of this motion." The Petitioner notes that the "record facts" remained unchanged only because the Appellate Division so dictated. Notwithstanding that the *original* record on appeal conflicts with the interlocutory appellate fact finding, the Petitioner contends that in ignoring the record and denying his requested supplementation as Appellant, the Appellate Division denied him an opportunity to have his case fairly adjudicated on the basis of a complete record. Since the record, especially when read with the requested supplementation, unequivocally belies the factual underpinnings of the interlocutory decision, the denial of the motions to supplement the record denied the Petitioner due process of law by preventing him from presenting his case. The Appellate Division itself has stated:

> The aim of due process is to prevent fundamental unfairness. It includes as one of its essential ingredients the opportunity to defend. If established, the deprivation of a reasonable opportunity to prepare a defense may be regarded as a denial of due process. (Citations omitted).

State v. *Johnson*, 87 N.J.Super. 195, 197, 198 (App. Div. 1965).

In its interlocutory opinion, the Appellate Division candidly admitted engaging in appellate fact finding determinative of their decision. The Court wrote:

> We agree generally with the factual findings made by the judge. They are sustained by sufficient credible evidence. However, we are compelled to make *independent supplemental findings* based on the record in order to give a more complete background of the facts upon which we predicate our determination. (emphasis added).

State v. *Kahlon,* 172 N.J.Super. 331, 335 (1980). The Petitioner submits that the said "independent supplemental findings" are not in fact based on the record even then before the Court, and further, that the materials that your Petitioner persistently and fruitlessly sought to present to the Appellate Division upon *his* appeal from the final judgment conclusively establish the erroneous nature of said "supplemental findings." It was this arbitrary fact-finding and subsequent denial of the Petitioner's attempts to present a complete record to the Appellate Division that violated the Petitioner's due process rights.

The significance of this arbitrary exclusion becomes apparent from a brief comparison of the "supplemental findings" of the Appellate Division with the record on appeal and the transcript of proceedings at the probable cause hearing. It will become clear that the basis for the interlocutory decision is unfounded in the record.

The Appellate Division narrated its "independent" version of the relevant facts in the following manner:

> Toth ordered defendant out of the car and informed him that somebody was smoking marijuana in the car. Defendant first stated that his two passengers, hitchhiking students from France picked up by him near Harrisburg, were smoking it. After Toth directed the students out of the vehicle and began to question them, defendant interrupted Toth's interrogation and stated that defendant alone was smoking marijuana.
>
> Following this admission Toth gave defendant Miranda warnings and subjected the occupants of the car to a protective "pat down." He then returned to defendant's vehicle to determine the area from which the odor of marijuana had emanated. He checked the vehicle's ashtray and found a half-burned marijuana cigarette (roach) approximately

one inch long. From his training Toth thought the roach to be unusually large. It was neither burning nor hot when discovered.

In checking the interior further, Toth found a clear plastic bag filled with what was later determined to be approximately ½ ounce of marijuana and a package of cigarette wrapping papers. The bag and papers were hidden behind the sun visor on the *passenger's side.* Toth returned to the three people and advised them that they were under arrest. Defendant asked Toth not to arrest the French students as they had no knowledge that there was any marijuana in the vehicle.

Toth handcuffed only defendant and returned to the back seat of the car, reasonably believing, since the female occupied the back seat, that more marijuana might be found there. Although he noticed the very heavy odor of unburned marijuana, Toth found only a portable television set on the floor and no potential marijuana containers. He lifted the rear seat but found nothing.

Toth took the keys from the ignition and opened the trunk. Again he smelled a very heavy odor of unburned marijuana. Inside the trunk were several suitcases and a cardboard box labeled "Cooler Keg." The box appeared to be a 30-dozen capacity egg crate. Although the box flaps were closed, there was a six-inch square opening on top. The flaps did not cover the box top completely.

Green plastic, similar to the type used in garbage bags, was visible from the box opening. Toth lowered his nose to the opening. He was positive that the odor of unburned marijuana emanated from the plastic bag in the box. Upon opening the box flaps Toth discovered that the bag, although tied shut, had two or three tears in it. He enlarged one of the tears and observed what was determined to be marijuana. He also found the scale underneath a clothing bag in the trunk of the car.

> *At about this time a backup unit arrived at the scene.* It transported the French students to the Somerville State Police station. Defendant and Toth awaited a tow truck at the scene. (Emphasis added).

Id. at 336, 337. In this inaccurate scenario Trooper Toth is on his own, alone, searching the rear seat and the trunk of the vehicle while in the presence of three persons, only one of whom is handcuffed. As noted above, this interpretation is in obvious conflict with the actual testimony. At the hearing on the motion to suppress Trooper Toth specifically testified that after he had handcuffed the Petitioner, "[p]rior to entering the rear of the vehicle, he] told [the French students] to sit on the guardrail *and almost simultaneously a backup unit arrived, another trooper.*" (emphasis added) (Motion to Suppress — p.36). This testimony, contradicting the fact-finding of the Appellate Division, is consistent with and corroborates Toth's testimony at the probable cause hearing on November 9, 1978 before the Honorable George B. Esposito, Magistrate, which the Appellate Division on two occasions arbitrarily declined to consider. At the probable cause hearing, Trooper Toth testifed as follows:

> Q. And describe the marijuana [sic] or what ever you found above the sun-visor.
> A. It was a small plastic bag, I would say maybe a quarter of an ounce.
> Q. Green vegetable substance inside?
> A. Brown.
> Q. At that point did you put Mr. Kahlon under arrest?
> A. Yes. And the other two subjects.
> Q. *This is before you searched the rear of the car?*
> A. Yes.
> Q. Did you call for a back-up unit at that time?
> A. No I didn't, *but another trooper was driving by at the time and he stopped.*

> Q. Did you tell Mr. Kahlon at the time you arrested him, or at the time of the arrest that you were impounding his vehicle?
>
> A. *I told him we were impounding it* and me and Mr. Kahlon would wait at the scene until the tow truck came. *The other two subjects were taken to the barracks by the other trooper.* (emphasis added).

(Probable Cause Hearing — p. 12, 13). It is thus clear that the supplemental findings" conflict with the evidence presented at both the motion to suppress and the probable cause hearing. In actuality, the evidence indicates that at the time Trooper Toth entered the rear of the passenger compartment and thereafter searched the trunk and containers, the French students had already been removed from the scene and the Petitioner was handcuffed within the police vehicle. Trooper Toth was, for all practical purposes, unconcerned and secure when he searched the trunk of the vehicle and the personal effects of Mr. Kahlon contained therein. The car was immobile and everything in it was safely in Toth's custody awaiting arrival of the tow truck. No inventory search was conducted until later, after the vehicle had been removed to the station.

The situation shown by the evidence stands in stark contrast to the misconstrued facts underlying the Appellate Division's interlocutory determination. The Court reasoned:

> Unlike *State* v. *Slockbower,* 79 N.J.1 (1979), and *State* v. *Ercolano, supra,* the vehicle in the present case was not impounded. The time here was late afternoon — 4:20 p.m. Defendant's vehicle was movable on an open highway and was being used for an illicit activity. The intent and purpose of the police, predicated on probable cause, were to search the trunk of the vehicle for contraband — marijuana — while it was on the highway. *Although all three*

> *occupants of the car were arrested and out of the vehicle, only defendant's freedom of movement was physically restricted.* Toth had moved the others away from the car and taken the keys. However, Toth's testimony supports the view—and even if it did not, it is not reasonably inconceivable — that, Toth's weapons and physical prowess notwithstanding, the *others* could have overpowered him, grabbed the keys and escaped. Under these circumstances a plain exigency existed justifying a warrantless search of the car trunk at the scene. (emphasis added).

State v. *Kahlon, supra* at 340. The Petitioner submits that it is manifestly clear that the "supplemental findings" of the Appellate division are palpably erroneous. There was no exigency at the time Toth searched the contents of the trunk. The vehicle was immobile, the students had been removed, and Mr. Kahlon was restrained in Toth's patrol car. This fact has been brought to the attention of the Appellate Division in your Petitioner's Brief on Appeal from the final judgment, in his Motion to Supplement the Record, in his Response to the State's Motion for Summary Affirmance, in his Amended Motion to Supplement the Record, and in his Petition for Rehearing. The Petitioner submits that the Appellate Division's interlocutory misapprehensions of fact are undeniable. The arbitrary, capricious and persistant denial of the Appellate Division to responsibly address the actual evidence is a denial of your Petitioner's constitutional rights to due process of law.

The Petitioner, Mamoon Kahlon, faces a sentence of one to two years incarceration. Mr. Kahlon was a citizen and resident of East Pakistan until he and most of his family were forced to flee to the United States during the Bangladesh Revolution in 1970. He is presently married to an American citizen and resides in Bloomington, Indiana, where he operates his own business creating

stained glass. Mr. Kahlon is a life long member of the *Ahmadiya* sect of Islam, a minority religious group which has been declared non-muslim and stripped of all civil rights by government fiat in West Pakistan: the Petitioner's only destination in the event of deportation as a result of this case. The serious ramifications of the arbitrary actions of the Appellate Division bear far more strongly on your Petitioner than the ordinary defendant because the ultimate penalty is extremely more severe. The interests of justice militate in favor of this Honorable Court's reviewing the actions of the Appellate Division in response to their denial of your Petitioner's right to due process and fundamental fairness herein displayed.

Conclusion

Wherefore, your Petitioner, Mamoon Rashid Kahlon, prays this Honorable Court to grant the instant Petition for Certiorari and to provide such relief as this Honorable Court deems fit and proper.

Respectfully submitted,

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APPENDIX

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-4707-78

STATE OF NEW JERSEY,

Plaintiff-Appellant,

vs.

MAMOON RASHID KAHLON,

Defendant-Respondent.

Argued: January 31, 1980 - Decided: Feb. 13, 1980

Before Judges Fritz, Kole and Lane.

On appeal from Superior Court, Law Division, Somerset County.

L. Gilbert Farr, Assistant Prosecutor, argued the cause for appellant (David Linett, Somerset County Prosecutor, attorney).

Thomas E. Lenahan, Jr. argued the cause for respondent (Franchino & Lenahan, attorneys).

The opinion of the court was delivered by

KOLE, J.A.D.

Defendant was indicted for possession of over 25 grams of marijuana and possession thereof with intent to distribute. He moved for suppression of all evidence obtained from the search of his motor vehicle. After a hearing, the judge sustained the seizure of marijuana found in the interior of the vehicle but suppressed the evidence found [sic.] the trunk thereof, including 30 pounds of marijuana, a balance scale and cash in the

amount of $3,731, as well as statements made by defendant after the search of the trunk.*

We granted the State leave to appeal from the ensuing order. We reverse the order to the extent that it suppresses the evidence seized from the trunk of the car and the statements made by defendant after such search. We hold that such evidence was legally seized and, of course, the later statements were not tainted thereby.

We agree generally with the factual findings made by the judge. They are sustained by sufficient credible evidence. However, we are compelled to make independent supplemental findings based on the record in order to give a more complete background of the facts upon which we predicate our determination.

On October 3, 1978 at approximately 4:20 p.m., State Trooper Toth stopped defendant's vehicle as it was traveling south on Interstate Highway 287 in Bridgewater Township, since Toth's radar device showed that it was proceeding at 30 miles per hour, considerably less than the normal speed for that highway. The vehicle was traveling in the center lane and, at that rate of speed, was causing other motorists to pass it on the right.

After stopping the vehicle, Toth requested that defendant exhibit his driver's license and motor vehicle

---

* The judge properly held that the stop of defendant's vehicle was not an illegal random stop; that Officer Toth had a right to enter the passenger area of the vehicle to search it for marijuana since he not only smelled burned marijuana but defendant had admitted smoking it; that defendant was not entitled to have *Miranda* warnings given by the officer since he voluntarily had stated that it was he who had smoked the marijuana rather than his French-speaking passengers, and that probable cause justified the search of the interior of the car and the seizure therefrom of the "roach" and the small quantity of marijuana found in the vehicle.

registration. Defendant complied with the request. Toth noticed that another male was seated on the passenger's side next to defendant and a female was seated in the back. When defendant opened his window to exhibit his credentials, Toth smelled an odor he believed to be burning marijuana. Toth was familiar with the scent of marijuana, both burned and unburned, from attendance at several drug training seminars and courses.

Toth ordered defendant out of the car and informed him that he knew that somebody was smoking marijuana in the car. Defendant first stated that his two passengers, hitchhiking students from France picked up by him near Harrisburg, were smoking it. After Toth directed the students out of the vehicle and began to question them, defendant interrupted Toth's interrogation and stated that defendant alone was smoking marijuana.

Following this admission, Toth gave defendant *Miranda* warnings and subjected the occupants of the car to a protective "pat down." He then returned to defendant's vehicle to determine the area from which the odor of marijuana had emanated. He checked the vehicle's ashtray and found a half burned marijuana cigarette (roach) approximately one inch long. From his training Toth thought the roach to be unusually large. It was neither burning nor hot when discovered.

In checking the interior further, Toth found a clear plastic bag filled with what was later determined to be approximately ½ ounce of marijuana and a package of cigarette wrapping papers. The bag and papers were hidden behind the sun visor on the passenger's side. Toth returned to the three people and advised them they were under arrest. Defendant asked Toth not to arrest the French students as they had no knowledge that there was any marijuana in the vehicle.

Toth handcuffed only defendant and returned to the back seat of the car, reasonably believing, since the female occupied the back seat, that more marijuana might be found there. Although he noticed the very

heavy odor of unburned marijuana, Toth found only a portable television set on the floor and no potential marijuana containers. He lifted the rear seat but found nothing.

Toth took the keys from the ignition and opened the trunk. Again he smelled a very heavy odor of unburned marijuana. Inside the trunk were several suitcases and a cardboard box labeled "Cooler Keg." The box appeared to be a 30 dozen capacity egg crate. Although the box flaps were closed, there was a six inch square opening on top. The flaps did not cover the box top completely.

Green plastic, similar to the type used in garbage bags, was visible from the box opening. Toth lowered his nose to the opening. He was positive that the odor of unburned marijuana emanated from the plastic bag in the box. Upon opening the box flaps, Toth discovered that the bag, although tied shut, had two or three tears in it. He enlarged one of the tears and observed what was determined to be marijuana. He also found the scale underneath a clothing bag in the trunk of the car.

At about this time, a backup unit arrived at the scene. It transported the French students to the Somerville State police station. Defendant and Toth awaited a tow truck at the scene. While defendant's vehicle was being towed to the station, Toth questioned defendant about the quantity of marijuana in the the bag and learned that it was about 30 pounds. Toth had already warned defendant of his *Miranda* rights after he had volunteered that he was smoking the marijuana. Defendant also told Toth that he had over $3,000 in the bottom of a plastic clothing bag in the car trunk.

When the police were satisfied that the French students were innocent of any illegal activities, they were released.

We agree with what appears to be the judge's determination that Toth was rightfully in the rear interior of

the car to conduct a further search for marijuana. We find further that Toth was a trained police officer who, as found by the judge, smelled and was able to smell unburned marijuana while thus lawfully in that part of the car's interior. His inability to pin-point the source of the smell of unburned marijuana while in that area of the automobile although it appeared to emanate from the rear of the vehicle, together with the marijuana already found in the car, reasonably could leave him to conclude, as he did, that the odor came from the car's trunk and accordingly established probable cause to search the trunk for such marijuana. See, *State* v. *Harrison*, 111 *Ariz.* 508, 533 P. 2d 1143 (Sup. Ct. 1975); *People* v. *Cook*, 13 *Cal.* 3d 663, 119 *Cal. Rptr.* 500, 532 *P.* 2d 148 (Sup. Ct. 1975), *cert. den.* 423 *U.S.* 870, 96 *S.Ct.* 135, 46 *L.Ed.* 2d 100 (1975); *Ford* v. *State*, 37 *Md. App.* 373, 377 *A.* 2d 577 (Ct. Spec. App. 1977). See also, *United States* v. *Hosch*, 577 *F.* 2d 963 (5 Cir. 1978); *United States* v. *Thompson*, 558 *F.* 2d 522, 524 (9 Cir. 1977), *cert. den. sub. nom. Reeve* v. *United States*, 435 *U.S.* 914, 55 *L.Ed.* 2d 504 (1978); *United States* v. *Barnard*, 553 *F.* 2d 389 (5 Cir. 1977); *Sanchez* v. *State*, 582 *S.W.* 2d 813 (Tex. Crim. App. 1979), *cert. den.* ..... *U.S.* ..... (January 21, 1980). *Cf. Johnson* v. *United States*, 333 *U.S.* 10, 13, 92 *L.Ed.* 436, 440 (1948) in which the court indicated that detection of opium odors by trained individuals could constitute probable cause. Contrast the fact situation in *State* v. *Patino*, 163 *N.J. Super.* 116, 122-123 (App. Div. 1978), certif. granted 79 *N.J.* 477 (1979).

There were also sufficient exigent circumstances here justifying the warrantless search of the trunk and the search and seizure of the box contained therein and its contents, as well as the scale and the money. Under the circumstances of this case, that warrantless search and seizure were entirely reasonable and legally unassailable.

We disagree with the judge's determination that since defendant and his passengers had been arrested prior to the time the trunk was actually opened, the trunk and

its contents were under the exclusive dominion and control of the arresting officer before the search thereof, and thus there was no exigency to justify the subsequent warrantless search and seizure. That this car on the side of a highway could have been towed to the police barracks while its occupants were under arrest and in custody and a search warrant for the trunk could have been obtained does not negative the existence of exigent circumstances.

Ever since *Carroll* v. *United States*, 267 *U.S.* 132, 69 *L.Ed.* 543 (1925), courts have recognized what has come to be known as the "automobile exception" to the warrant requirement. The validity of this exception was reaffirmed and its underlying rationale was restated by the Supreme Court in *Arkansas* v. *Sanders*, ... *U.S.* ....., 61 *L.Ed.* 2d 235 (1975). The court there addressed the question whether, in the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile stopped and searched for contraband. However, *Sanders* further held that given probable cause to search and the mobility of the vehicle when it is stopped, the stop and search of the automobile itself is legally permissible.

The inquiry to be made as to the validity of the warrantless search in the present case is twofold: (1) at the scene did the police have probable cause to search the trunk of the automobile? and (2) were the exigencies then arising from the movable nature of the vehicle such that a warrantless search was justified? If the answer to both questions is in the affirmative, the search was constitutionally valid. See, *Sanders, supra,* 69 L.Ed. 2d at 246, n. 14; *Texas* v. *White,* 423 *U.S.* 67, 46 *L.Ed.* 2d 209 (1975), cited in *State* v. *Ercolano,* 79 *N.J.* 25, 46 (1979). We answer both inquiries in the affirmative.

Unlike *State* v. *Slockbower,* 78 *N.J.* 1 (1979) and *State* v. *Ercolano, supra,* the vehicle in the present case was not impounded. The time here was late afternoon—4:20 p.m. Defendant's vehicle was movable on an open highway and was being used for an illicit activity. The in-

tent and purpose of the police, predicated on probable cause, were to search the trunk of the vehicle for contraband—marijuana—while it was on the highway. Although all three occupants of the car were arrested and out of the vehicle, only defendant's freedom of movement was physically restricted. Toth had moved the others away from the car and taken the keys. However, Toth's testimony supports the view—and even if it did not, it is not reasonably inconceivable—that, Toth's weapons and physical prowess notwithstanding, the others could have overpowered him, grabbed the keys and escaped. Under these circumstances a plain exigency existed justifying a warrantless search of the car trunk at the scene. It would not have been readily practicable for the police to have obtained a warrant for this purpose prior to the search. See, *Chambers* v. *Maroney*, 399 *U.S.* 42, 26 *L.Ed.* 2d 419 (1970); *State* v. *Ercolano, supra,* at 38, 43-46; *State* v. *Waltz*, 61 *N.J.* 83, 88 (1972); *State* v. *Murray*, 151 *N.J.Super.* 300 (App. Div. 1977), certif. den. 75 *N.Y.* 541 (1977); *State* v. *Gaines*, 147 *N.J.Super.* 84, 96-97 (App. Div. 1975), aff'd o.b. 72 *N.J.* 346 (1977); *State* v. *Kennedy*, 134 *N.J.Super.* 454 (App. Div. 1975); *State* v. *McCarthy*, 130 *N.J.Super.* 540, 543-545 (App. Div. 1974); *State* v. *Boone*, 114 *N.J.Super.* 521 (App. Div. 1971); *State* v. *Brown*, 160 *N.J.Super.* 227 (Law Div. 1978). See also, *State in the Interest of H.B.*, 75 *N.J.* 243, 251-252 (1977); *Sanchez* v. *State, supra.*

The search of the box found in the trunk was lawful. It was from this box that the odor of marijuana emanated and in which the marijuana was found. Unlike the luggage in *Arkansas* v. *Sanders, supra,* the flaps of the box did not completely cover it, the opening at the top of the box plainly showed a green plastic bag from which the odor could be detected and there were tear holes in the plastic bag which, when opened further, made the marijuana visible to the trained eye of the officer. In these circumstances, it cannot be said that defendant had any reasonable expectation of privacy in the contents of the box or that the exigency that permitted the opening of the car trunk at the scene did not apply as well

to the then search of the box. The facts here did not require, as in *Arkansas* v. *Sanders, supra,* that the police remove the box, reduce it to his exclusive possession and obtain a warrant to search it.

In any event, even if a warrant for the search of the box were required by reason of *Arkansas* v. *Sanders, supra,* we have concluded that, essentially for the reasons expressed in *State* v. *Howery,* 80 *N.J.* 563 (1979), *Sanders* is not retroactive to a search and seizure, as here, that occurred prior to the date of its determination. Compare, *State* v. *Pace,* 171 *N.J.Super.* 240 (App. Div. 1979), where the matter of the retroactivity of *Sanders* was not discussed and apparently not raied. But see, *State* v. *Carpentieri,* 168 *N.J.Super.* 589 (App.Div. 1979), certif. granted, 81 *N.J.* 406 (1979), with which we do not agree.

We note that the police officer here was alone and could reasonably believe that under the then existing law, given probable cause to search an automobile on the highway even though defendant and the two passengers were under arrest, exigent circumstances justified the warrantless search of the box. See, *State* v. *Gray,* 59 *N.J.* 563 (1971); *State* v. *McCarthy, supra.* See also, *State* v. *Parker,* 153 *N.J.Super,* 481, 487 (App. Div. 1977).

We find no indication that our courts anticipated the holding in *Sanders.* Thus, for example, *State* v. *DeLorenzo,* 166 *N.J.Super.* 483 (App. Div. 1979) and *State* v. *Parker, supra,* deal with the search of bags or luggage already secured in police facilities, rather than the search of luggage stored in a car stopped on the highway. They are thus distinguishable from *Sanders.*

The scale was found as part of the legally proper car trunk search at the scene. The $3,731 in cash was found by Toth while the automobile was at headquarters in the car trunk but in a clothing bag pursuant to information volunteered to him by defendant after the valid car trunk search. Hence, the seizure both of the items was valid.

The provisions of the order which suppressed evidence and defendant's statements are reversed.

SUPREME COURT OF NEW JERSEY

M-700

September Term 1979

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

MAMOON RASHID KAHLON,

Defendant-Movant.

ORDER
(Filed April 30, 1980)

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 29th day of April, 1980.

True Copy
Stephen W. Townsend
Clerk

Stephen W. Townsend
Clerk

MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-4071-79T2
Motion No. M-613-80

Before Part C
Judges: Fritz, Polow, Joelson

STATE OF NEW JERSEY,

vs.

MAMOON RASHID KAHLON,

MOVING PAPERS FILED: October 21, 1980
ANSWERING PAPERS FILED: November 13, 1980
DATE SUBMITTED TO COURT: November 17, 1980
DATE ARGUED:
DATE DECIDED:

ORDER
(Filed November 25, 1980)

This matter having been duly presented to the court, it is hereby ordered as follows:

MOTION/FOR
SUMMARY AFFIRMANCE OF
CONVICTION

GRANTED	DENIED	OTHER
	X	

SUPPLEMENTAL:

This is a motion for summary disposition under R. 2:8-3(b), brought by the State. The motion was filed long after the time limited for the bringing of such motion, contrary to the express prohibition of the Rule. No leave was sought to extend this time. We expressly disapprove of this impropriety. However, defendant has not objected on this account, and we now grant leave to the State, *nunc pro tunc*, to file this motion.

Defendant acknowledges as sound the apparent legal basis for this motion. He defends against the motion on the ground that the appeal in this matter presents facts not substantially the same as those appearing in a prior appeal (172 *N.J.Super.* 331 (App.Div. 1980)), the determination in which the State here asserts to be the law of the case. Defendant's motion to supplement the record in the present appeal was denied. Accordingly, the record facts remain unchanged and are identical here with those of record in the first appeal at least for purposes of this motion.

Defendant's argument distills to one urging that the opinion in the first appeal contained findings by the Appellate Division not supported by the record and erroneous. Whatever the fact may be, it remains that there was no motion for rehearing respecting the first appeal, there was apparently no petition for certification and defendant's motion for leave to appeal was denied by the Supreme Court on April 29, 1980 (M-700, September Term 1979).

Accordingly, the law of the case is that established by the adjudication on the first appeal.

Following the first appeal, prosecuted by the State on leave from an order in the trial court suppressing evidence seized from the trunk of defendant's car in which the only issue concerned the legality of that search, defendant entered a plea of guilty to possession of a controlled dangerous substance with intent to distribute and was sentenced. Thereafter defendant appealed. It would appear from defendant's brief resisting the State's motion for summary disposition that the sole issue being raised on this appeal following the entry of a guilty plea is the legal propriety of the search. For reasons noted above that issue was determined in the prior appeal.

The State's motion is granted and the judgment is affirmed.

For The Court:

/s/ John W. Fritz
John W. Fritz, P.J.A.D.

Witness, the Honorable John W. Fritz, Presiding Judge of Part C, Superior Court Of New Jersey, Appellate Division, this 24th day of November, 1980.

Elizabeth McLaughlin
Clerk of the Appellate Division

SUPREME COURT OF NEW JERSEY

C-549

September Term 1980

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

MAMOON RASHID KAHLON,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION
(Filed June 5, 1981)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4071-79 having been submitted to this Court and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 3rd day of June, 1981.

/s/ Stephen W. Townsend
Clerk

Opposition

Office-Supreme Court, U.S.
FILED
AUG 24 1981
ALEXANDER L. STEVAS,
CLERK

No.

81-234

In The

Supreme Court of the United States

October Term, 1980

MAMOON RASHID KAHLON,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition For Writ of Certiorari to the Superior Court of New Jersey Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT

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No.

In The

Supreme Court of the United States

October Term, 1980

MAMOON RASHID KAHLON,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition For Writ of Certiorari to the Superior Court of New Jersey Appellate Division

BRIEF IN OPPOSITION FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether *Robbins v. California* is applicable to a case where an open container is involved.

2. Whether the Appellate Division property granted summary disposition.

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I

PROCEDURAL HISTORY

We are in substantial agreement with petitioner's procedural history.

STATEMENT OF FACTS

On October 3, 1978, at approximately 4:20 p.m., State Trooper Richard Toth was operating a stationary model K-55 Radar Unit at milepost 28 on Interstate Route 78, Bridgewater Township, New Jersey (T5-4 to 8). At that time, a 1972 Buick traveled eastbound through the radar set up at 30 m.p.h. in the center lane of the highway (T5-9 to 10). The speed limit on Route 78 is 55 m.p.h. (T5-15).

The Trooper pursued the vehicle for traveling too slow and constituting a hazard on the roadway. In the Trooper's experience, vehicles do not generally travel at so slow a speed on Route 78; and in addition, this vehicle was in the center lane of the highway when it should have been to the right (T5-19 to 22). Its position was forcing numerous other vehicles to pass improperly on the right (T5-23).

The Trooper pursued the vehicle for approximately 2 miles and brought it to a stop at milepost 20 on Route 287 southbound (T6-1 to 3). There were three individuals within the car. The petitioner, Mamoon Rashid Kahlon, was the driver of the vehicle, a male passenger sat in the front seat and a female passenger sat in the backseat of the vehicle. Trooper Toth approached the vehicle. At this point, there is a factual discrepancy in the testimony. The Trooper testified that he approached the driver's side of the vehicle with the petitioner still seated behind the wheel and requested credentials. As soon as he reached the front window of the vehicle, Toth detected the odor of burning marihuana (T7-11 to 12). At that time, he asked the petitioner to exit the vehicle and walk to the rear of the car

where he advised the petitioner of his observations (T7-19 to 25). The petitioner, on the other hand, testified that he was standing outside the vehicle when Trooper Toth approached, asked for credentials, then took the petitioner to the side of the vehicle and told the petitioner that he "reeked of marihuana." (T49-16—T50-4). In any event, it is undisputed that the Trooper did note the odor of burned marihuana and so advised the petitioner.

At this point, the petitioner stated that the two passengers had smoked marihuana, whereupon the Trooper asked them to exit the vehicle and attempted to question them regarding the incident (T8-12 to 15). Questioning was difficult since the passengers were French students and spoke little English (T8-17 to 22). The petitioner interrupted the questioning and admitted to Trooper Toth that he had been smoking marihuana (T8-25). The petitioner was advised of his Miranda rights. Toth then merely patted down all three individuals (T9-2 to 4).

Trooper Toth then asked the three individuals to move to the side of the roadway and searched the front passenger area of the vehicle. That search revealed an unusually large half-burned marihuana cigarette in the ashtray of the vehicle as well as a clear plastic bag of marihuana and a pack of wrapping paper over the driver's visor (T9-19 to 21, T11-4 to 7, T11-23 to 25). At this time, Trooper Toth went to the rear of the vehicle and advised all three individuals that they were under arrest for possession of the marihuana (T12-12 to 14).

The Trooper handcuffed only this petitioner and returned to check the rear passenger seat area of the vehicle for additional contraband since one of the occupants had been sitting back there (T13-2 to 9).

Once inside the rear passenger area of the petitioner's vehicle, Trooper Toth detected a heavy odor of unburned

marihuana (T13-18 to 19). Trooper Toth is an officer with extensive training in the investigation and detection of narcotics. This training was outlined for the court below at the hearing (T3—T4). The Trooper searched the rear compartment, lifting the seat of the vehicle, but could find no other marihuana inside the passenger area to account for the heavy unburned marihuana odor (T14-9 to 11).

At that time, the Trooper retrieved the car keys from the ignition and opened the trunk of the vehicle. As it opened, he smelled a very heavy odor of unburned marihuana emanating from inside the trunk of the vehicle. There were several suitcases and containers in the trunk. The Trooper noted a cardboard box with closed flaps and a 6 x 6 square opening on the top. The box was not taped closed. He lowered his head to the box and smelled a very strong odor of unburned marihuana. Through the 6 x 6 opening, Trooper Toth could see a green plastic bag, the type of bag, which based upon his experience and training, usually conceals large quantities of marihuana. (Trooper Toth also saw stalks of raw marihuana protruding through holes in the plastic bag.) Trooper Toth was positive that the odor was coming from the box, which he seized and opened, revealing approximately 30 lbs. of unburned marihuana (T14-15 to 25, T15-1 to 15). The Trooper also retrieved a bench beam scale from the trunk.

At this time, Trooper Toth called for a back-up unit, which transported the two passengers to headquarters. Trooper Toth and the petitioner waited at the scene for the arrival of a tow-truck (T16-21 to 25). While en route to the station, the petitioner indicated to the Trooper that over $3,000 in currency was located in a plastic bag in the trunk of the car (T18-19 to 21). Upon his arrival at headquarters, Trooper Toth seized the bag of money which contained $3,731 (T21).

LEGAL ARGUMENT

Petitioner contends certification should be granted because the Appellate Division refused to allow him to supplement the record on appeal. Initially, it should be noted that the probable cause hearing transcript was prepared for defense counsel on April 9, 1979, whereas the motion to suppress was not heard until June 1979. Thus, the transcript could have been, but was not, utilized to impeach the Trooper's credibility at the hearing. Since the transcript is not newly discovered evidence, and was not introduced at the motion to suppress, we submit it could not properly have been added to the record on appeal in any event. It is clear that the Supreme Court's consideration of an appeal of the decision of the Appellate Division, affirming the judgment of the trial court, must be confined to the record made in the trial court. *Wallach v. Williams*, 52 N.J. 504 (1968). Thus, we submit that no error, much less federal constitutional error, occurred in the denial of the motion to supplement the record.

We also submit that this case falls squarely within *State v. Patino*, 83 N.J. 1 (1981) where the Court noted that, in the case of a moving vehicle, probable cause is the minimal requirement for a reasonable search permitted by the Constitution. *Id.* at 10. No additional exigency beyond the moving or readily moveable nature of the vehicle at the time the initial stop is made is required. The search here did not initially go beyond the interior of the vehicle. Only after the strong odor of unburned marihuana was noted coming from the trunk did Trooper Toth proceed to search the trunk.

Petitioner contends *Arkansas v. Sanders*, 442 U.S. 753, 99 S. Ct. 2586 (1979) should have been held by the Appellate Division to apply retroactively. We submit that this aspect of the opinion is mere dicta, the holding of the Court being that *Sanders* is inapplicable under the facts here presented.

The Court, in its published opinion, ruled that *Arkansas v. Sanders* did not apply to the instant case because the flaps of the box from which the odor of marihuana was detected were not closed. Further, there were tear holes in the bag which made the marihuana visible to the trained eye of the officer. Thus, these facts distinguished the instant case from *Arkansas v. Sanders,* as well as *Robbins v. California,* ____ U.S. ____ (1981) which was limited expressly to closed containers. A bag with stalks of marihuana protruding therefrom is not such a closed container and its possessor has failed by his sloppy packaging to exhibit a reasonable expectation of privacy in the item searched. We submit the plain view exception, as discussed in *Robbins,* is fully applicable here.

Finally, we note that the Appellate Division expressly entertained the State's motion for summary disposition because the petitioner failed to object to the untimely filing. It therefore granted leave to file the motion nunc pro tunc, a procedure authorized under New Jersey practice.

CONCLUSION

Based upon the above authority and the facts of the within matter, the State of New Jersey respectfully requests this Court to deny petitioner's petition for certification.

Respectfully submitted,

DAVID LINETT
Attorney for Respondent

L. GILBERT FARR
On the Brief

Petitioner's Reply Brief

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No. 81-234

In the Supreme Court of the United States

OCTOBER TERM, 1980

MAMOON RASHID KAHLON,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether *Arkansas* v. *Sanders* Is Controlling, Retroactively, To A Case Arising After This Court's Decision In *United States* v. *Chadwick*, Where The Evidence Against Petitioner Was Contained In A Closed Cardboard Box, External Examination Of Which Did Not Reveal Its Contents And Which Was Seized From The Locked Trunk Of Petitioner's Vehicle Without Warrant Or Valid Exception?

II.

Whether When A State Grants To A Defendant In A Criminal Case The Right Of Appeal From The Trier Of Fact And The Appellate Court *Sua Sponte* Makes Findings of Fact Not Otherwise In Or Supported By The Record, The Appellant Then Has The Right To A Review Of Said Additional Findings Of Fact?

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The Respondent's Statement Of Facts Is Incorrect And Is Controverted By The Testimony Of Trooper Toth.

Although the record is clear and unambiguous, your Petitioner is constrained to correct the same errors and misinterpretations of the record that have been noted to the New Jersey Courts and the Respondent herein on at least six prior occasions. Completely disregarding the testimony of Trooper Toth, the Respondent asserts that no back up unit arrived at the scene of Petitioner's traffic arrest until after the search of the locked trunk

and the closed containers within it had occurred. (Respondent's Brief - 3). This claim carries with it the false implication that Trooper Toth was in the area with three arrestees, only one of whom was handcuffed, and was therefore in some form of danger. It was precisely this misapprehension of fact that formed the cornerstone for the Appellate Division's erroneous finding of exigency in the State's interlocutory appeal. *State* v. *Kahlon*, 172 N.J. Super. 331, 340 (App. Div. 1980).

The testimony of Trooper Toth belies this fiction. The Trooper testified that after he informed the French students and your Petitioner that they were under arrest "almost simultaneously a back up unit arrived, another trooper." (Transcript - Motion to Suppress p. 36). Based upon the admissions of Mr. Kahlon regarding the "roach" and the small bag of marijuana exculpating the others, Toth testified that he had "the other trooper [take] the two French speaking people to the station" for release. (Transcript - Motion to Suppress, p. 16). And further, Toth testified that he handcuffed Mr. Kahlon at the time of his arrest and placed him in the police car. (Transcript - Motion to Suppress p. 36). Trooper Toth testified similarly at the probable cause hearing on November 9, 1978. He there testified consistent with his prior testimony that after he had arrested the subjects "another trooper was driving by and he stopped," (Transcript - Probable Cause Hearing p. 12), and based upon the inculpatory admissions of Mr. Kahlon regarding the "roach" and the small bag of marijuana, Trooper Toth then had the other two subjects taken to the barracks by the other trooper where they were released. (Transcript - Probable Cause Hearing p. 13; Motion to Suppress p. 21-22). Trooper Toth testified that Mr. Kahlon was cooperative and that he never felt any danger.

In regard to the cardboard box seized from the locked trunk of Petitioner's vehicle, Trooper Toth testified that it was closed and that all he could see through the aperture left by the flaps was green plastic. (Transcript - Motion to Suppress p. 14, 15). The record is silent as to whether the box was taped shut, however, it is clear that Trooper Toth had to open the flaps in order to search the cardboard box. Toth then noticed that the bag which he removed from the box was tied shut. (Transcript - Motion to Suppress p. 15). Only after the cardboard box was searched and the bag removed did Toth notice "two or three tear holes," in the bag, one of which he tore open in order to ascertain the contents. (Transcript - Motion to Suppress p. 15). Contrary to the parenthetical allegations of the Respondent, there is ***absolutely*** no evidence that Toth ever saw "stalks of raw marijuana protruding through holes in the plastic bag." (Respondent's Brief p. 3).

ARGUMENT

It is readily apparent that the Respondent fails to understand the Petitioner's second question presented for review. The denial of the Petitioner's motion for supplementation of the record is only a minor aspect aggravating the true issue: whether the Petitioner was afforded his due process right to an appeal to which he is entitled under New Jersey law? The Petitioner contends that where an appellate court, without ever hearing the evidence or observing the demeanor of the witnesses, reverses the judgment of the trial court on the basis of findings of fact made independently of the record below, controverted by the actual evidence, and from which no further review is allowed, that Petitioner has thereby been denied a right to which he is entitled, i.e., a fair appellate review. To argue that an appellate court can *sua sponte* make findings of fact not supported by the record, thereby reversing the judgment of the trial court where there is no right to further review and discretionary review is denied, does not raise a federal constitutional error is ludicrous. The enormity of such arbitrary actions offends the concept of fundamental fairness and renders the safeguards provided by the right of appellate review of factual findings pursuant to New Jersey law a nullity.

Despite the Respondent's suggestions, in fact, there was no necessity for Petitioner to impeach Trooper Toth's testimony at the suppression hearing with his testimony at the probable cause hearing because Trooper Toth's testimony at both hearings supported the Petitioner's assertion that the two students had been taken

from the scene to be released and that the Petitioner was handcuffed in the police vehicle at the time of the search of his trunk and its contents, thus removing the possibility of any so-called exigency. Moreover, Trooper Toth testified that Mr. Kahlon was cooperative and that he did not feel any jeopardy. The motion to supplement the record in the Appellate Division was made solely to demonstrate the orignal error made at the interlocutory stage. It must be borne in mind that the trial court ruled in favor of the Petitioner and suppressed the evidence and that that finding was therefore cloaked with a presumption of correctness. Since the Appellate Division reversed the judgment of the trial court in the instant case, the case of *Wallach* v. *Williams,* 52 N.J. 504 (1968) relied on by respondent is inapposite.

The supplementation of the Appellate record sought by Petitioner clearly indicated the injustice done at the interlocutory appeal level, but whether supplementation should have been granted or not is only one facet of the issue. The Petitioner submits that the Appellate Division was thereby put on notice that it had a *duty* to re-examine its erroneous interlocutory independent fact-finding by an examination of competent evidence already in the record, if your Petitioner was to be given his opportunity to prosecute a fair appeal. Instead, the same panel of the Appellate Division that decided the interlocutory appeal prosecuted by the State arbitrarily and capriciously granted summary affirmance of your Petitioner's Appeal from the final judgment based on the tenuous principle of judicial convenience — the "law of the case" doctrine. The Petitioner respectfully submits that this constitutes a due process violation.

In response to the Petitioner's primary issue, i.e., the applicability of *United States* v. *Chadwick,* 433 U.S. 1 (1977) and *Arkansas* v. *Sanders,* 442 U.S. 753 (1979), the Respondent argues first that the retroactivity issue was mere dicta, and second, that in any event *Sanders* should not apply in this situation. The "facts" relied on by the Respondent are not supported by the record. The first "fact" asserted by the respondents is neither supported by the evidence nor the opinion of the Appellate Division. The respondent argues that *Sanders* should not apply because the flaps of the cardboard box "were not closed." (Respondent's Brief p. 5, Respondent's Questions Presented I). The Appellate Division disagreed, finding rather that the flaps did not completely cover it, but noted that the opening was covered with green plastic. (Petition for Certiorari p. 7a). Trooper Toth testified that the "flaps were such that the box was closed." (Transcript - Motion to Suppress p. 14). All that could be seen was green plastic, (Transcript - Motion to Suppress p. 15, 42) in a cardboard box that was as closed and as sealed as it could practicably be. Trooper Toth then opened the closed flaps and searched the interior of the cardboard box. Toth testified that "[a]ll I saw was the square, something square and plastic around it, and as I looked on the sides there were" "two or three tear holes in the bag. The bag was tied shut." (Transcript - Motion to Suppress p. 42, 15). Trooper Toth then ripped open one of the holes and observed marijuana. (Transcript - Motion to Suppress p. 15).

The tear holes were invisible until after Toth searched the cardboard box and removed the bag, and there is no testimony that marijuana was visible until after he had torn one of the small holes open. The alleged odor of

marijauna provided no justification for the warrantless search of the box and could only properly be used as an averment in an affidavit for a search warrant. *United States* v. *Chadwick, supra* at 5 (trained police dog's positive response did not override warrant requirement). Again, the Petitioner is constrained to note that there is not one jot of evidence indicating that "stalks of marihuana" protruded from anywhere. (Respondent's Brief p. 5).

The Petitioner respectfully submits the case of *Robbins* v. *California,* ..... U.S. ....., (No. 80-148, July 1, 1981) has settled both aspects of the Appellate Division's treatment of *Sanders* in favor of the Petitioner. First, *Robbins* held *Sanders* applicable to a search conducted in 1975. And second, this Honorable Court in *Robbins* rejected the so-called doctrine of worthier containers as being unworkable. *Robbins* v. *California, supra* at 29 Cr.L. 3117. As in *Robbins,* this case involved an opaque green plastic bag, except that here the bag was further protected by being encased in an egg crate whose "flaps were such that the box was closed," and unlike *Robbins,* the box was located in the locked trunk of Petitioner's vehicle. As in *Robbins,* however, visual examination of the exterior of the box did not reveal the nature of its contents. (Transcript - Motion to Suppress p. 14). The Petitioner respectfully proposes that the summary relief granted the petitioners in *Bible, et al.* v. *Louisiana,* ..... U.S. ..... (No. 80-1080, July 2, 1981) would be a just disposition of the instant Petition.

CONCLUSION

Wherefore, your Petitioner, Mamoon Rashid Kahlon, prays this Honorable Court to grant his Petition for Certiorari and to provide such relief as this Honorable Court deems fit and proper.

Respectfully submitted,

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